

**Dormitory Auth. of the State of N.Y. v A. Williams
Trucking & Backhoe Trenching, Inc.**

2016 NY Slip Op 30581(U)

April 6, 2016

Supreme Court, New York County

Docket Number: 450133/2011

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Plaintiff,

Index No.: 450133/2011

- against -

A. WILLIAMS TRUCKING & BACKHOE TRENCHING, INC.,
ASPRO MECHANICAL CONTRACTING, INC., CNA
SURETY CORPORATION d/b/a AMERICAN CASUALTY
COMPANY OF READING, PA., DIERKS HEATING
COMPANY, INC., FUTURE TECH CONSULTANTS OF
NEW YORK, INC., PYRAMID FIRE PROTECTION, INC.,
SMI-OWEN STEEL COMPANY, INC., STONEWALL
CONTRACTING CORPORATION, ADF SOUTH
CAROLINA, INC.,

DECISION/ORDER
Mot. Seq. 012 and 013

Defendants.

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AMERICAN CASUALTY COMPANY OF READING, PA.,

Third-Party Plaintiff,

- against -

A.J. McNULTY & COMPANY, INC.,

Third-Party Defendant.

-----X
A. WILLIAMS TRUCKING & BACKHOE TRENCHING, INC.,

Third-Party Plaintiff,

- against -

FRED TODINO & SONS, INC., J & A CONCRETE CORP.,
CONSTRUCTION WATERPROOFERS, INC.,
FALCO CONSTRUCTION CORP., MORETRENCH
AMERICAN CORP.,

Third-Party Defendants.

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KELLY O'NEILL LEVY, J.:

Moretrench American Corp. (Moretrench) moves, pursuant to CPLR 3126, to dismiss A. Williams Trucking & Backhoe Trenching, Inc.'s (Williams) third-party complaint against it for failure to respond to discovery demands (Mot. Seq. 012). Williams opposes the motion. Moretrench further moves, under Mot. Seq. 013, for leave to reargue, pursuant to CPLR 2221 and 22 NYCRR 670.6, the portion of the court's October 16, 2015 decision/order (October 16th Decision) that denied Moretrench's cross-motion for dismissal of Williams's indemnification claims against it.¹ Moretrench also moves, in the alternative, to reargue the branch of the October 16th Decision that denied its motion to vacate the note of issue. Williams filed no opposition to the second motion. Defendant Dierks Heating Company, Inc. (Dierks) filed the sole responsive paper, arguing, among other things, for denial of the portion of Moretrench's motion seeking to vacate the Note of Issue and Certificated of Readiness. The motions are consolidated for disposition.

Discussion

The court first considers Moretrench's motion for leave to reargue its cross-motion to dismiss, which Williams opposed orally but submitted no written opposition and is deemed unopposed. The motion for leave to reargue is granted, and upon reargument, the third-party action against Moretrench is dismissed for the reasons set forth below.

¹ The court, in the October 16th Decision granted Moretrench's motion to dismiss only to the extent of dismissing any claim based upon contribution.

On a motion for leave to reargue under CPLR 2221, the movant must show that in deciding the prior motion, the court overlooked or misapprehended a matter of fact or law. *See Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979), *Schneider v. Solowey*, 141 A.D.2d 813, 813 (2d Dep't 1988).

As a preliminary matter, because Moretrench did not assert in the underlying motion that Williams's breach of contract claims are barred by the six-year statute of limitations,² that argument is not properly the subject of a motion to reargue. *See People v. D'Allesandro*, 13 N.Y.3d 216, 219 (2009), *Foley*, 68 A.D. at 567-68, *Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 258 (1st Dep't 2004).

The court now turns to Moretrench's argument that the court improperly denied dismissal of the contractual indemnification claims against it. When determining whether contractual indemnity applies, the court must strictly construe the specific language of the contract. *See Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-92 (1989), *Alfaro v. 65 W. 13th Acquisition*, 74 A.D.3d 1255, 1255-56 (2d Dep't 2010). Here, paragraph 10 of the April 24, 2002 Subcontract between Williams and Moretrench (Subcontract) clearly delineates the circumstances under which the indemnity clause may apply. They include employee benefit act, personal injury, and property damage claims. Moretrench correctly argues that the indemnity provision the Subcontract was not triggered because there is no bodily injury or property damage claim, *see Dormitory Auth. of State of N.Y. v. Caudill Rowlett Scott*, 160 A.D.2d 179, 180-81 (1st Dep't 1990), and no employee benefit act claim is at issue. Accordingly, the court grants

² *See Cabrini Med. Cen. v. Desina*, 64 N.Y.2d 1059, 1061 (1985), *Louis Joy Corp. v. Boriss Breslow Corp.*, 168 A.D.2d 223, 223 (1st Dep't 1990).

Moretrench reargument of its cross-motion to dismiss, and upon reargument, grants the motion (seq. 013) to the extent that the indemnity claims against Moretrench are dismissed. In light of the dismissal, the court denies the motion to dismiss for failure to comply with discovery (seq. 012) as moot. Similarly, the issue of whether to vacate the note of issue need not be reached.

Order

It is, therefore

ORDERED that Moretrench American Corp.'s motion for leave to reargue (Mot. Seq. 013) is granted, and upon reargument, the third-party complaint of A. Williams Trucking & Backhoe Trenching, Inc. is dismissed as against Moretrench and otherwise denied, with costs and disbursements to said third-party defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that Mot. Seq. 012 is denied as moot; and it is further

ORDERED that the third-party action is continued as against the remaining third-party defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of Moretrench American Corp. and that all future papers filed with the court bear the amended caption; and it is further


ORDERED that counsel for Moretrench American Corp. shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the

Trial Support Office (Room 148), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

Dated: April 6, 2016

ENTER:



KELLY O'NEILL LEVY, A.J.S.C.

HON. KELLY O'NEILL LEVY